

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KOOKABURRA, LLC,
a Michigan corporation, d/b/a
CABBAGE PATH CAFÉ AND
CATERING,

Case No: 18-007220-CB
Hon. Brian R. Sullivan

Plaintiff,

-vs-

HOME OWNERS INSURANCE
COMPANY, a Michigan domiciled
insurance company and MICHAEL
SENAKIEWICH, a Michigan resident,

Defendants.

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City
County Building, City of Detroit, County of
Wayne, State of Michigan, on
6/7/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

The question presented in this action for declaratory judgment is whether the contagious disease exclusion in plaintiff's insurance policy precludes coverage for the two suits against plaintiff which allege bodily injury from Hepatitis A alleged to have been transmitted from the food served, or consumed, at plaintiff restaurant. The court finds coverage is precluded based on the exclusion in the insurance policy.

FACTS

Two lawsuits were brought against Cabbage Patch Café & Catering. Both lawsuits alleged in August, 2017 each of the plaintiffs contracted Hepatitis A after eating food served at the Cabbage Patch Café.

The Estate of Catherine Sheridan (Sheridan) alleged in August, 2017 she ate food served at the Cabbage Patch Café, became infected with Hepatitis A, became ill and died. Her estate sued plaintiff for negligence attributing the contraction of Hepatitis A from food served or consumed at the Cabbage Patch Café. Michelle Senakiewich sued defendant for strict liability, breach of warranties, negligence, negligence per se, and violation of the Michigan Consumer Protection Act.

Defendant Home Owners issued an insurance policy to plaintiff Kookaburra which covered the period of exposure (October 1, 2016 through October 1, 2017). That policy also contains communicable disease exclusion. Home Owners declined to defend either suit or indemnify Kookaburra. Kookaburra filed this declaration action that Home Owners is obligated to defend or indemnify it for the claims brought by Senakiewich and Sheridan.

Home Owners brought a motion for summary disposition seeking a declaration it was not obligated to defend or indemnify based on the exclusion in the policy.

The following facts are not disputed:

1. Kookaburra, LLC did business as Cabbage Patch Café and Catering.
2. Cabbage Patch is a restaurant and serves food.
3. Kookaburra had a commercial general liability policy, number 04625361 through Home Owners Insurance Co. policy activate from October 1, 2016 through October 1, 2017.
4. Senakiewich alleged she ate food at the Cabbage Patch in August and September, 2017 which was contaminated with Hepatitis A.
5. Senakiewich became ill and suffered bodily injury. Medical testing on her determined she had a disease, Hepatitis A.
6. Senakiewich attributes that illness and injury to the consumption of food served at the Cabbage Patch Café.
7. Senakiewich filed a complaint against Kookaburra seeking damages for those bodily injuries.
8. The estate of Catherine Sheridan filed suit against Cabbage Patch and alleged she ate at the Cabbage Patch Café in August, 2017.
9. Sheridan alleged she contracted Hepatitis A from the food served at the Cabbage Patch Café. Sheridan eventually died from liver failure and sepsis.
10. The estate alleged Sheridan became infected with Hepatitis A through the food she consumed at the Cabbage Patch Café.

Defendants each brought cross motions for summary disposition.

STANDARD OF REVIEW

MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120 (1999). A motion for summary

disposition under MCR 2.116(C)(10) asserts there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. See *Odom v Wayne County*, 483 Mich 459 (2008); *Maiden v Rozwood*, Id. A motion for summary disposition pursuant to “(C)(10)” tests whether there is factual support for a claim. *Maiden*, 461 Mich at 120 (1999). MCR 2.116 (G)(5). The moving party has the initial burden of supporting its position by evidence, i.e., affidavits, depositions, admissions or other documentary evidence that there is no genuine issue of material fact to be decided at trial. MCR 2.116(G)(3)(b); *Ward v Franks Nursery and Crafts, Inc.*, 186 Mich App 120 (1990). The evidence must be considered in a light most favorable to the party opposing the motion. *Rice v Auto Insurance Association*, 252 Mich App 25 (2002). If the proffered evidence fails to establish a genuine issue regarding any material fact the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10)(G)(4); *Quinto v Cross and Peters Company*, 451 Mich 358 (1996).

No material fact exists for trial if, in viewing the record of evidence in a light most favorable to the non-moving party reasonable minds could not return a verdict in the non-movants favor. *Skinner v Square D Company*, 445 Mich 153 (1994). The party opposing the motion must meet the proffer presented by the moving party and respond with affidavits or other evidentiary materials to demonstrate or show the existence of a factual dispute. See MCR 2.116(G)(4); *McCart v J. Walter Thompson, USA, Inc.*, 437 Mich 109 (1991). If the opposing party fails to submit such evidence to establish a question of fact it cannot rely on the allegation or denial of its pleadings and summary disposition is proper. See

SSC Associates Limited Partnership v General Retirement System of the City of Detroit, 192 Mich App 360 (1991).

When a motion is brought under sub-rule (C)(10) the adverse party may not rest on mere allegations or denials of the pleadings but must, by affidavits, or as provided for in the rules set forth in specific facts demonstrating a genuine issue for trial. If the adverse party fails to respond judgment shall be entered against him or her. *Maiden*, 461 Mich 120-121. A litigant's pledge or promise to establish an issue of fact cannot survive summary disposition under (C)(10). *Maiden*, 461 Mich at 121. A review in court under (C)(10) must consider the substantively admissible evidence proffered in opposition to the motion.

Motion

Kookaburra filed a motion for summary disposition alleging defendant Home Owners issued a commercial general liability policy which provided for protection to it. The two suits were tendered to Home Owners. Home Owners declined to defend or indemnify Kookaburra on the basis the exclusion states that the insurance policy does not apply to 'communicable disease':

- a. Expected or intended injury. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured and then are "communicable disease (bodily injury) arising out of or resulting from the transmission of any communicable disease by any insured.

Kookaburra alleges that there was not an expected or intended bodily injury to either plaintiff and an LLC is incapable of transmitting any virus.

Policy Language

The exclusion in the defendant's policy of insurance provides as follows:

"Bodily injury arising out of or resulting from the transmission of any communicable disease by an insured."

The above language of exclusion is in the contract between plaintiff and defendant.

Defendant Contention

Defendant contends 'communicable' is not a technical term but must be used in its ordinary sense. The dictionary definition of communicable means "passed" or "communicated" or "transmitted." The word transmission means to pass from one to another.

Defendant cites the Michigan Public Health Code (Michigan Adm Code R325.171(1)(C)) which defines "communicable" to mean "capable of being transmitted from individual to individual, from animal to individual, or from an inanimate reservoir to an individual.

Defendant also states the Center of Disease Control recognizes Hepatitis A as a communicable disease. Hepatitis A is a vaccine preventable, communicable disease of the liver, caused by the Hepatitis A virus (HAV). It is usually transmitted person to person.

Defendant urges this court to conclude the plain language of the exclusion should apply because both plaintiffs undisputedly alleged they contracted suffered from Hepatitis A, an infection that can only be transmitted person to person. It is, therefore, communicable. If it is communicable it is excluded under the language of the policy of insurance and is not covered, not insured.

Plaintiffs Contentions

Plaintiff alleges that the exclusion does not apply because the bodily injury from the transmission of the communicable disease must be transmitted by an insured. In the two separate complaints, both plaintiffs allege that Kookaburra is liable for the acts of its employees in the service of contaminating food to the plaintiffs.

Moreover, the policy language of “any insured” means that coverage is excluded if the transmission was performed by an insured. The use of the word “any” extends to all insured. See *Vanguard Insurance Company v McKinney*, 184 Mich App 799 (1990).

The plaintiff’s complaint alleges that an employee of the Cabbage Patch Café transmitted the disease to the plaintiffs. That disease transmission is alleged to have been accomplished through an insured, triggering the exclusion.

Timothy Sheridan, personal representative of the estate of Catherine Sheridan,

deceased, alleged in his complaint that the Cabbage Patch Café was a restaurant and that on August 30, 2017 Catherine Sheridan went there, purchased and ate a meal. Sheridan further alleged that the Café's employees are the agent one of which had Hepatitis A and transferred it to Sheridan by way of food, surfaces, utensils, dishes, glasses or other items in which they came in contact with. In the alternative, the plaintiff alleged the food served to Catherine Sheridan was contaminated from other sources under the control of the defendants. Plaintiff alleged a theory of supervising, management or control of the staff and preparers in the buying of, preparation of and service to the patrons. Moreover, it was alleged that the defendant was strictly liable for the adulterated food product that defendant "manufactured, distributed and/or sold" and delivered to Catherine Sheridan, a breach of warranty.

Law

Plaintiff's allegations amount to the fact the cafe transmitted the Hepatitis A virus, a communicable disease, to plaintiff.

The court concludes there is no evidence of intent to commit bodily injury to either plaintiff by any defendant. However, the exclusion is for bodily injury from the transmission of a communicable disease by an insured. Such policy language is not vague or ambiguous.

The rules of construction for contracts are well developed. The insurer has the burden of proving exclusion applies. *Roddis Lumber & Veneer Company v American Alliance Insurance Company*, 330 Mich 81 (1951).

Insurance exclusions are construed strictly and narrowly. *Auto Owners Insurance Company v Churchman*, 440 Mich 560 (1992).

A court must determine whether the language used in the contract is ambiguous.

When the dispute in the cases concerns not the facts of the dispute but whether or not the alleged occurrence is within the scope of the insurance company that question is one of law for the court. *Dembinski v Aetna Casualty & Insurance Company*, 76 Mich App 181 (1977). A court must determine whether the language used in the contract is ambiguous.

The interpretation of an insurance contract is a question of law. *Wilkie v Auto Owners Insurance Company*, 469 Mich 41 (2003); *Rory v Continental Insurance Company*, 473 Mich 457 (2005).

The question of whether a contract contains an ambiguity is a question of law for the court. See *Mayer v Auto Owners Insurance Company*, 127 Mich App 23 (1983). Construction of a contract is a question of law for the court. *Fragner v American*

Community Mutual Insurance Company, 199 Mich App 537 (1993). *Rory v Continental Insurance Company*, 473 Mich 457 (2005).

The primary function of the court is to give effect to the intent as discerned from the language of the contract examining the contract as a whole. *Auto Owners Insurance Company v Churchman*, 440 Mich 560 (1992). If the contract is not ambiguous the court must enforce it as written according to its plain meaning. *Clevenger v Allstate Insurance Company*, 443 Mich 646 (1993). In such instances the court does not resort to extrinsic evidence. *Upjohn Company v New Hampshire Insurance Company*, 438 Mich 197 (1991). The language used in an insurance contract is to be given its ordinary meaning unless it is apparent from a reading of the entire instrument that a different or special meaning is intended. *Sump v St. Paul Fire and Marine Insurance Company*, 21 Mich App 160 (1970).

A contract is ambiguous if it's capable of two or more constructions both of which are reasonable. *Petovello v Murray*, 139 Mich 639 (1984). If an insurance contract is deemed ambiguous and susceptible to two different interpretations the one most favorable to the insured is to be adopted. If a policy is found to be ambiguous the court can determine the intent of the parties by reporting an examination of the extrinsic evidence such as custom and usage. *Michigan Millers Mutual Insurance Company v Bronze and Plating Company*, 197 Mich App 482 (1992). The most common of extrinsic aids to the construction of an insurance policy is custom and usage. *Allstate Insurance Company v Freeman*, 432 Mich 565 (1989).

An insurance company is free to limit and define the scope of coverage as long as the language is not ambiguous and such provisions do not contravene public policy. *Heniser v Frankenmuth Mutual Insurance Company*, 449 Mich 155 (1995). Definitions of an insurance policy control the contract. *Century Surety Company v Charron*, 230 Mich App 79 (1998). But if a term is not defined in the policy the courts supply the commonly understood meaning of the word. *Citizens Insurance Company v Pro Seal Service Group, Inc.*, 477 Mich 75 (2007). The use of undefined terms in an insurance policy does not render the contract ambiguous. 'Communicable' is not defined in the insurance contract.

Clear and specific exclusions in an insurance policy must be enforced. A court cannot hold and ensure liable for a risk it did not undertake or assume. *Hunt v Drielick*, 496 Mich 366 (2014); *Henderson v State Farm Fire & Casualty Company*, 460 Mich 348 (1999). If the contract of insurance is unambiguous it must be enforced as written. Moreover, if an exclusion in a policy applies then coverage is lost even though a concurrent cause of the loss not excluded for the coverage may not be excluded. *Vanguard Insurance Company v Clark*, 438 Mich 463 (1991), overruled in part *otg Wilkie v Auto Insurance*, 469 Mich 41 (2013).

The legal literature is replete with courts resorting to common meanings of terms to the use of the dictionary definition.

Discussion

Section 1A of defendant's policy defines bodily injury and the duty to defend a suit seeking damages. Section 2 defines who is an insured. Section 5, paragraph 4 defines bodily injury as "bodily injury, bodily sickness or bodily disease sustained by a person, including death resulting from any of these at any time." Paragraph 14 " 'Occurrence' means an accident including continuous repeated exposure to substantially the same general harmful conditions."

Section 2 contains exclusions and subsection R states coverage for a communicable disease is excluded.

Plaintiff alleges that the Home Owners exclusion is vague and ambiguous because it is not as precise as, for instance, "contagious disease." Plaintiff cites instances of other insurance policies using these precise definitions in their policy. Plaintiff distinguishes between a communicable disease as one capable of direct transmission. In contrast a contagious disease is one capable of transmission through an object. Therefore the defendant policy's exclusion is ambiguous.

Plaintiff further argues the Hepatitis A virus (HAV) was transmitted, apparently, through an indirect means of an infected person coming in contact with plate or food which is consumed by another person. The plaintiff argues the exclusion in the Home Owners

policy is ambiguous because it fails to distinguish between diseases, viruses or illnesses. Moreover, it does not specifically identify which communicable diseases are excluded.

Plaintiff provides sample language which is far more specific in its identification of excluded diseases such as AIDS, HIV, SARS, West Nile, Chicken Pox, Influenza, Legionella, Hepatitis, Measles, Meningitis, Mononucleosis, etc. The plaintiff further contends because the Home Owners exclusion does not make the specific reference to cholera, bubonic plagues, anthrax, etc. as well as those other diseases it is too vague and ambiguous to be enforced against the insureds. Moreover, the distinction between “communicable” (transmittable from person to person by direct contact or by indirect vectormines) and “contagious,” infectious disease “communicable” by contact with one who has it or with an object, plaintiff argues, creates an ambiguity that needs to be resolved in the insured’s favor.

The court does not conclude there is a distinction in the words ‘contagious’ or ‘communicable’. The word contagious is defined as “an overlapping criteria.” Both words involve that spread by contact with one who has it or contact with an item which a person or an object was touched by a person who has the transmitting agent.

The term “arising out of” is a broad term. It encompasses concurrent causation. See *United States Fidelity and Guaranty Company v Citizens Insurance Company of America*, 201 Mich App 491 (1993); *Allstate Insurance Company v Freeman*, 432 Mich 656

(1989).

The plaintiff asserts that contagion or infection by the patrons of the restaurant with HAV obtained from a plate or food should be read to be outside the exclusion, and the exclusion should be restricted to that obtained directly or solely from the infected person only. Defendant counters that a corporation or LLC can only act through its agents, in this case, an employee. See *Upjohn Company v New Hampshire Insurance Company*, 438 Mich 197 (1991). The plaintiff adds that medical definitions and even the Center for Disease Control definitions conflict with Home Owners policy is an indication of the ambiguity of the term.

Rather, the court concludes that communicable disease is that which goes from one to another person and that the exclusion applies.

Finally, Kookaburra alleges there is no evidence either of the plaintiffs contracted the disease from the plaintiff restaurant. While it is not an established fact that the plaintiffs contracted the disease from the restaurant, such are the allegations in both complaints. Where the cause of action alleged in the complaint is entirely within an exclusion of the policy, there is no duty to defend. See *Meridian Mutual Insurance Company v Hunt*, 168 Mich App 672 (1988); *American Bumper and Manufacturing Company v National Union Fire Insurance Company*, 261 Mich App 367 (2004).

The focus of the inquiry of the court is not the fact of the injury but on the alleged cause of the claimed injury. *Matouk v Michigan Municipal League Liability and Property Pool*, 320 Mich App 402 (2017).

Conclusion

Whether defendant is contractually obligated to defend or indemnify claims under an insurance policy is a question of law. It requires interpretation of the policy. *American Bumper & Mfg. Co. v National Union Fire Ins. Co.*, 261 Mich App 367, 375 (2004). Coverage extends to meritless and uncovered theories, if one theory is within the policy. *Auto Club Group Ins. Co. v Buchell*, 249 Mich App 468, 48-481 (2001); *Matouk*, 320 Mich App at 858. Insurers can limit the scope of liability. Coverage is lost if any exclusion applies to the insured's claims. *Century Surety Co. v Charron*, 230 Mich App 79, 83 (1988). Exclusions are effective, as liability cannot be predicated on a risk not assumed. *Matouk, Id.*

The plaintiff makes a cogent argument for the ambiguity of the policy term., However, no case is cited for the proposition that the term “communicable” disease is ambiguous or that it is trumped by the term ‘contagious’. The courts use of dictionary terms to identify common meanings is common. See *Citizens Insurance Company v Pro Seal Service Group, Inc.*, 477 Mich 75 (2007); *Henderson v State Farm*, 460 Mich 348 (1999).

The test for whether an exclusion in an insurance policy is ambiguous is set forth in *Raska v Farm Bureau Mutual Insurance Company of Michigan*, 412 Mich 355 (1982): “The only pertinent question, therefore, is whether the exclusionary cause in this contract is ambiguous, for if it is not ambiguous we are constrained to enforce it”.

A contract is said to be ambiguous when its words may reasonably be understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading if it leads one to understand there is no coverage under the same circumstances the contract is ambiguous and should be construed against its drafter in favor of coverage. Yet if a contract, however unartfully worded or clumsily arranged, fairly admits of but one interpretation it may not be said to be ambiguous or, indeed fatally unclear.

In this instance the court concludes “communicable diseases” are excluded from coverage. Moreover, Hepatitis A is a communicable disease based on the common meaning of the word. Therefore, however it is examined, the contract admits of but one interpretation and is not ambiguous. The court is constrained to enforce it.

For all the above reasons the plaintiffs motion for summary disposition is denied and the defendants motion is granted; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 6/7/2019

BRIAN R. SULLIVAN
Circuit Court Judge

ISSUED: